(15)

No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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I. THIS CASE IS PROPERLY BEFORE THIS COURT[1]

A. CAA § 412 Applies To The Appeal In This Case

A statute providing for appeal to this Court from a judgment "upon the constitutionality" of a provision of a statute, such as CAA § 412, 2 U.S.C. § 1412, encompasses appeal from a judgment upon the constitutionality of a provision of the statute, as applied. See *United States v. Eichman*, 496 U.S. 310, 313 (1990) (appeal pursuant to 18 U.S.C. § 700(d) from judgment upon the constitutionality of Flag Protection Act of 1989, as applied); cf. *Fleming v. Rhodes*, 331 U.S. 100, 104 (1947) (where statute provided for direct appeal to this Court from a decision "against the constitutionality" of a statute, "there is an appeal from an order that invalidates, as unconstitutional, a statute as applied"). The argument below of the Office of Senator Mark Dayton ("Dayton Office") that the Speech or Debate Clause deprives the court of jurisdiction of Hanson's suit squarely placed in issue the constitutionality of CAA § 408, 2 U.S.C. § 1408, as applied in this case. Thus, the judgment below is not only a ruling on the scope of the Speech or Debate Clause but also a judgment on the constitutionality of CAA § 408, *as applied*.[2]

The legislative history supports that Congress intended this Court to decide appeals from rulings challenging the CAA on Speech or Debate Clause grounds. When Congress added CAA § 413, 2 U.S.C. § 1413, to S. 2, the bill that would become the

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[1] The Office of Senator Mark Dayton responds to the arguments of Appellee Brad Hanson ("Hanson"); the United States Senate ("Senate Amicus"); Congressmen Frank and Shays; and AARP.

[2] Accepting this appeal will not open the appeal floodgates. See Senate Amicus at 12. A district court ruling on a Member's assertion of Speech or Debate Clause privilege in response to discovery would not implicate any provision of the CAA and, therefore, would not be a ruling "upon the constitutionality of any provision of this Act."

CAA, expressly preserving the Speech or Debate Clause privileges, Congress simultaneously added CAA § 412 to ensure that any doubts regarding the applicability of the privileges would be decided quickly and definitively by this Court.[3]

B. The Dayton Office Properly Appealed This Case To The D.C. Circuit

The Dayton Office and Hanson agree that the district court's minute order could not have been appealed directly to this Court. See Hanson Br. at 42; but see Senate Amicus at 12-14. In its Motion to Dismiss, the Dayton Office argued that Speech or Debate Clause immunity protects personnel actions taken against employees whose job duties directly relate to the due functioning of the legislative process and that Hanson's duties were such duties. (Def.'s Mot. Dismiss and Stmt. of P. & A. in Supp., No. 03-CV-1149, Dkt. Entry #12 (Sept. 12, 2003).) As such, in denying the motion to dismiss, the court could have concluded that Hanson's duties were not directly related to the due functioning of the legislative process -- a decision that would not have been upon the constitutionality of the statute. Because the district court's minute order provided no rationale (J.S. App. 58a-59a), the Dayton Office did not know and could not have known whether the decision was

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[3] Compare S. 2, 104th Cong. (1995), the bill that became the CAA, with H.R. 1, 104th Cong. (1995) (the version of the bill passed by the House before passing S. 2); see also the statement Senator Dole made at the time the appeal provision for the Government Employee Rights Act of 1991 ("GERA"), the predecessor to the CAA, 2 U.S.C. § 1224(c) (repealed 1995), was introduced: "[T]here are still some lingering doubts as to the constitutionality of these [judicial review] provisions," and "[t]hese doubts should be resolved by the best arbiter of constitutional issues, the Supreme Court itself, and as quickly as possible." 137 Cong. Rec. S15500 (daily ed. Oct. 30, 1991).

upon the constitutionality of the statute. There was no such uncertainty in *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 389-90 (1982), which therefore has no application to this appeal.

C. The Petition For A Writ Of Certiorari Is Proper

This action is also reviewable by this Court by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because the D.C. Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

II. THIS CASE IS MOOT

Abrogating the sovereign immunity of congressional employing offices, Congress in the CAA specified that the "employing office" -- and only the employing office -- shall be the defendant in a suit under the statute. 2 U.S.C. § 1408. The "employing office" is "the personal office of a Member of the House of Representatives or of a Senator." 2 U.S.C. § 1301(9)(A).

Congress's design was both conscious and careful. Prior versions of the bill, which were not enacted, instead denominated as the defendant "the Congress" or "the Senate." Appellant Br. at 20-21. One version notably would have permitted suit "against the Congress *or* the congressional employer." H.R. 2099, 103d Cong. § 2(c)(1) (1993) (emphasis added).

The "employing office" is a formal entity, not an artificial construct. The CAA may have established that term of art, but the term nonetheless describes an entity that previously existed:

employing offices were "employing authorities that *exist[ed]* in the Legislative Branch" prior to the enactment of the CAA. H.R. Rep. No. 103-650, pt. 2, at 13 (1994) (emphasis added). The employing office comes into existence when the Member is elected and dissolves when the Member leaves.[4]

The employing office (rather than, for example, the Senate) makes the employment decisions -- hiring, firing, promoting, and the like -- that are subject to suit under the statute. Thus,

> [i]ndividuals do not, in fact, work for "Congress" in a generic sense, rather they are employed by one of a number of distinct employing offices -- each of which is considered a separate entity -- whether that entity is the office of an individual Senator or Member of Congress . . . .

H.R. Rep. No. 103-650, pt. 2, at 13 (1994) (accompanying H.R. 4822). Each employing office has, for example, its own employee policy manual. The employing office notably has (as Hanson and Senate Amicus point out) its own counsel -- the Office of the Senate Chief Counsel for Employment ("SCCE") -- which operates independent from the counsel to the Senate itself, maintaining distinct client relationships and privileges that the Senate has always respected. "[E]ach of the 180 offices of the Senate is an individual client of the SCCE, and each office maintains an attorney-client relationship with the SCCE." *Legislative Branch Appropriations for Fiscal Year*

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[4] Notably, once the Member leaves office no entity exists to control the litigation on behalf of the defendant. There literally is no party with the power and responsibility to determine what defenses should be interposed, what discovery should be taken, what motions should be filed, and the like.

2000, Hearings Before a Subcomm. of the Comm. on Appropriations, 106th Cong., S. Hrg. 106-33 (1999), at 251. Contra Hanson Br. at 46; Senate Amicus at 17 (seeking to characterize an employing office as an administrative unit of the Senate). Accordingly, since the inception of the SCCE, Senate leadership has never requested or received confidential or privileged information from the SCCE about CAA cases; has not tried to participate in counseling or mediation; has never directed or participated in litigation strategy; and has never reviewed, read, approved, or been a signatory to a settlement agreement.

Once a Member leaves office, the corresponding employing office ceases to exist. For example, no office exists that could hire or fire employees, or incur any debts; the office space must be vacated, and the office receives no mail. Appellant Br. App. 6a-7a (employees taken off the payroll on January 2 of the year Member's term expires). The only office expenses that can be paid after the Senator leaves office are those incurred prior to the close of the office. These payments are made from the office's appropriated funds and only to the extent that any balance of such funds remains. Moreover, the office has no further responsibilities under the CAA, nor could it continue to comply with the Act. See, *e.g.*, S. Res. 242, 104th Cong., § 825.312(d) (1996) (stating that FMLA rights, including the right to restoration, cease once the employment relationship terminates). At that point, the office no longer meets the definition of an "employing office" because it is not the "personal office" of any member of Congress. Further, the CAA definition of "employing office" does not mention former Representatives or former Senators, see 2 U.S.C. § 1301(9)(A), and could not because former Members do not have personal offices in the legislative branch. In contrast, the statute expressly covers "former employee[s]." See 2 U.S.C. § 1301(4).

When a defendant ceases to exist and there is no successor, the case abates. *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949). In this case, Hanson's lawsuit names as the only defendant a literally non-existent entity that has no successor: the Dayton Office. When the Senator's term of office expired, the office simply ceased to exist, and the case abated.

Hanson notes that "[f]indings of abatement are now rare" because state laws and court rules (such as this Court's Rule 35.3) "cured the problem." Hanson Br. at 44. Appellant's Brief at 19 n.6 identified numerous federal statutes providing for succession and non-abatement of actions. But the relevant point is that Congress did not do so with respect to the CAA. That contrast is striking.

Moreover, in determining whether an action abates, the question is not whether some entity exists that would pay a judgment. Rather, the question is whether a defendant exists; the straightforward answer is "no." E.g., *Asociacion de Empleados del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1314 n.6 (11th Cir. 2006) (despite the continued availability of funds, suit could not continue because the defendants were defunct).[5] Further, contrary to Hanson's argument (Hanson Br. at 43), neither *Powell v. McCormack*, 395 U.S. 486, 498 (1969), nor *Davis v. Passman*, 442 U.S. 228, 229 (1979), is on point because at least two adverse parties existed in each case.

The Dayton Office is not extant simply because attorneys continue to defend "vigorously" the suit. For a suit to continue, there must be a party. See *Ellis v. Dyson*, 421 U.S. 426, 434

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[5] Notably, 2 U.S.C. § 1415(c) states that payments for "violations of section 201(a)(3)" must be paid by employing offices' appropriated funds.

(1975) (case or controversy requires extant parties throughout the litigation); *Shaffer v. Howard*, 249 U.S. 200, 201 (1919) (case mooted when defendant no longer in office and there was no statutory successor). Certainly in almost every abatement case, a lawyer continues to litigate the question of abatement. And when a defendant dies, a lawyer, after all, files a "suggestion of death." In this case, the SCCE has not continued to pursue this litigation based on the view that the employing office continues to exist; to the contrary, SCCE does not believe that it has a client in this litigation. But until this Court reaches that conclusion, counsel's obligation to the Court requires SCCE's continued participation.

Any doubt that only the employing office is the defendant in an action under the CAA and that this case has abated for that reason is resolved by the fact that the statute's private right of action is a waiver of the government's sovereign immunity from suit. That waiver must be "strictly observed." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Congress specified that the suit authorized against the employing office under the CAA "shall not constitute a waiver of sovereign immunity for any other purpose." 2 U.S.C. § 1413. Permitting this suit to go forward would require interposing some new defendant -- presumably, the Senate itself. But Congress has not waived the Senate's immunity from suit. See Appellant Br. at 20-21.

Further, the employing office is not merely a nominal entity, such that its dissolution is irrelevant. As noted, Congress took care to waive sovereign immunity specifically and exclusively with respect to the employing office. Hanson argues (Hanson Br. at 34) that the staff covered by the CAA are employees of the Senate or House, not the employing office. That is untrue and irrelevant: the legal issue is the status of the defendant, not the plaintiff. The further fact that "institutional counsel" represent the employing office (Hanson Br. at 34)

actually supports the finding of abatement, for it is notably the SCCE (not Senate Counsel) that is the employing office's counsel and indeed has a distinct attorney-client relationship with each office.[6] Finally, the fact that the Office of Compliance must authorize payment on settlements from the Treasury (Hanson Br. at 35) does not compel a contrary conclusion. The employing office (not the Senate) negotiates any settlement and must agree to it; the Office of Compliance (which is itself not an organ of the Senate) plays a purely administrative role and has promptly processed payment on every settlement to which Senate employing offices have agreed.

Substituting the Senate as the defendant would raise perplexing questions given Congress's political environment. For example, if a Senator from one party were sued while the other party controlled the Senate, the Senate and the Senator's office could have conflicting interests in litigation strategy and settlements. The Senate could settle the case for a significant sum and neither deny wrongdoing nor make the settlement agreement confidential. These political problems would be exacerbated if the Senator were running for reelection or for higher office.

Finally, Hanson argues that abatement is harsh. That is intrinsic to the doctrine; by definition, its application in a case in which a defendant ceases to exist extinguishes the plaintiff's right of action. But Hanson's contention that abatement would eviscerate the statutory scheme is wrong. Since the passage of

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[6] The extraordinary consequence of the position of Hanson and Senate Amicus that the actual employer and defendant in CAA actions is Congress or the Senate would presumably be that individual Senate employing offices would lose their attorney-client privilege with the SCCE, contrary to the express statements and practice in the Senate since the SCCE's inception.

the CAA, abatement has arisen only twice. The median tenures of Senators and Representatives are eleven and nine years, respectively. The CAA provided Hanson with a right to seek a remedy for alleged discrimination; indeed, he pursued counseling and mediation and, had he pursued his claim under 2 U.S.C. § 1405, his case would have been resolved before the employing office ceased to exist. But in any event, this is a question for Congress, which is fully empowered to provide for a successor to the employing office if it deems such a course appropriate. It is not for this Court to interpose that decision. See, *e.g.*, *United States ex rel. Bernardin v. Butterworth*, 169 U.S. 600, 605 (1898) (recommending Congress provide for non-abatement of actions against heads of departments).

III. THE SPEECH OR DEBATE CLAUSE BARS COURT JURISDICTION OF THIS ACTION

The Speech or Debate Clause does not bar CAA plaintiffs from seeking relief under the CAA. It affects only the forum in which some employees can sue. Those employees can file complaints with the Office of Compliance, 2 U.S.C. § 1405(a), receive a full hearing before an experienced arbitrator or retired judge, and receive all relief allowed by the statute, *id.* § 1405(c) and (g), because the Office of Compliance is part of the legislative branch, 2 U.S.C. § 1381(a). The forum restriction prevents judicial intrusion into the legislative function. A Member would have no legislative independence if a court were to hire and fire his alter egos directly; the Member's independence would be equally imperiled if a court accomplished the same thing, one step removed, by second guessing the Member's termination of his alter egos.[7]

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[7] The Judicial Conference report to Congress rejected application of CAA laws to the judicial branch because "[t]he judicial branch is a separate and co-equal branch of government under the United States Constitution.

A. Reliance On *Forrester* Is Misplaced

Hanson's and Amici's reliance on *Forrester v. White*, 484 U.S. 219 (1988), is misplaced. About the only thing *Forrester* and this case have in common is that both involved a termination. While the *Forrester* test balances considerations of public policy against the effect of exposure to liability, 484 U.S. at 224, "balancing plays no part" in determining the applicability of Speech or Debate Clause immunity. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 510 n.16 (1975). Thus, the "Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1." *Forrester*, 484 U.S. at 224.

Moreover, the rationales underlying common law judicial immunity and constitutional Speech or Debate Clause immunity are not the same. Judicial immunity "protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Id.* at 225. Speech or Debate Clause immunity is based on "the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch," and "the desire to protect legislative independence." *United States v. Gillock*, 445 U.S. 360, 369 (1980). Accordingly, while Speech or Debate Clause immunity

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It must retain autonomy with respect to internal administration . . . ." See JUDICIAL CONFERENCE OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 4 (Dec. 1996). The report explained that the preservation of an independent judiciary relies, in part, on "judicial autonomy in hiring law clerks and other judicial staff." *Id.* Requiring, for example, the payment of overtime wages to court employees would result in the hiring of fewer people, in turn disrupting the functioning of the judicial branch. *Id.* at 17.

protects all acts within the legislative sphere,[8] judicial immunity of state judges protects judicial independence and impartiality in adjudicating cases and, as such, does not protect all acts within the judicial sphere.[9]

B. The Speech Or Debate Clause Bars Court Jurisdiction Of This Suit Notwithstanding That The Defendant Is The Office Of A Member

The Speech or Debate Clause protects all acts within the legislative sphere irrespective of who the named defendant is.[10] Otherwise, none of the protections of the Speech or Debate

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[8] The Court has defined acts within the legislative sphere in various ways: (1) the due functioning of the legislative process, see *United States v. Brewster*, 408 U.S. 501, 512 (1972), and (2) an "integral part of the deliberative and communicative processes," by which Members perform their constitutional duties. *Gravel v. United States*, 408 U.S. 606, 625 (1972). The only acts the Court has found not protected by Speech or Debate Clause immunity are "the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress," *Brewster*, 408 U.S. at 512; accepting a bribe for a promised legislative act, *id.* at 526-27; attempting to influence the Department of Justice, *United States v. Johnson*, 383 U.S. 169, 172 (1966); private republication of classified report, *Gravel*, 408 U.S. at 625; and public republication of defamatory statements, *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979).

[9] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), is also inapt. There, the only issues were whether local officials had legislative immunity and whether introducing, voting for, and signing an ordinance were legislative acts. Notably, the Court did not apply a *Forrester* analysis. Moreover, *Bogan* did not involve an employee whose duties were part of the due functioning of the legislative process.

[10] As such, although the Speech or Debate Clause mentions only Senators and Representatives, "prior cases have plainly not taken a literalistic approach in applying the privilege." *Gravel*, 408 U.S. at 617.

Clause would be afforded: (i) preventing intimidation of legislators and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966); (ii) preventing the judiciary from intruding into the legislative sphere, and judging a Member's motive as to acts within the legislative sphere, *Eastland*, 421 U.S. at 502, 509; (iii) ensuring that legislators are not diverted from their constitutional duties, *id.* at 503; and (iv) "support[ing] the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal," *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (1808). "[J]udicial power [would] still [be] brought to bear on [a] Member[] of Congress and legislative independence [would be] imperiled." *Eastland*, 421 U.S. at 503. Thus, the immunity applied to a Senate subcommittee, which is an employing office under the CAA, see *id.* at 501, and to House functionaries who were not staff of a Member or Committee, see *Doe v. McMillan*, 412 U.S. 306, 312 (1973); see also *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (state committee and mayor acting in a legislative capacity covered); *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 733-34 (1980) (state supreme court acting in a legislative capacity protected).[11]

Further, Senate Amicus's assertion that Congress has waived the Speech or Debate Clause immunity of all Senate offices (Senate Amicus at 27 n.23) is inconsistent with Speech or Debate Clause jurisprudence in several respects. First, Speech or Debate Clause immunity must be expressly waived, see *United States v. Helstoski*, 442 U.S. 477, 490-91 (1979), and the CAA does not do so. Second, "the 'privilege is not a badge . . . , but an expression of a policy designed to aid in the

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[11] Although *Tenney* and *Consumers Union* involved state actors in § 1983 cases, the Court applies Speech or Debate Clause analysis in determining state legislators' immunity in § 1983 cases.

effective functioning of government.'" *Gravel v. United States*, 408 U.S. 606, 617 (1972) (quoting *Barr v. Mateo*, 360 U.S. 564, 572-73 (1959)). Thus, the issue is not who was sued. The issue is whether the case can be tried without a court questioning a legislative act or the motive for it. Third, the privilege "is not so much the privilege of the house . . . as of each individual member . . . . [H]e cannot be deprived [of it], by a resolve of the house, or by an act of the legislature." *Coffin*, 4 Mass. (1 Tyng) at 27. Indeed, it would be a disservice to the Constitution and the history of the Speech or Debate Clause for the Clause to apply only when either house wants it to; the Clause protects independence, not conformity. The Member "does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature." *Id.*

Finally, Hanson asserts that even if Senator Dayton's personnel decisions with respect to Hanson are within the legislative sphere, the Dayton Office's implementation of those decisions is not protected if the decisions are unlawful.[12] Hanson Br. at 36. The cases he cites, *Kilbourn v. Thompson*, 103 U.S. 168 (1880), *Powell v. McCormack*, 395 U.S. 486 (1969), and *Dombrowski v. Eastland*, 387 U.S. 82 (1967), do not support his argument because those decisions were not based on whether the defendant was a Member, but on whether the challenged actions were within the legislative sphere. In both *Kilbourn* and *Powell*, the resolutions were void as to substance because the directive of the resolutions exceeded the Members' constitutional authority. Therefore, the suits could proceed against the functionaries because their implementation

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[12] Speech or Debate Clause immunity applies to an act that is within the legitimate legislative sphere even if the act is illegal. See *Eastland*, 421 U.S. at 510.

of those resolutions was not within the legitimate legislative sphere. In *Dombrowski*, the case could proceed against the subcommittee's counsel only with respect to conduct that was not within Congress's legislative sphere -- his alleged involvement in a conspiracy with a state legislative committee to seize documents on "*its*" behalf. 387 U.S. at 84 (emphasis added). In contrast, when the counsel acted on behalf of the U.S. Senate subcommittee, Speech or Debate Clause immunity applied. See *id.* at 83-85; see also *Gravel*, 408 U.S. at 619-20.

Unlike *Kilbourn* and *Powell*, Senator Dayton's actions did not exceed his constitutional authority. Therefore, even if one were to view the personnel actions as the Dayton Office's implementation of Senator Dayton's directives, the Speech or Debate Clause would still immunize them.

C. The Scope Of The Speech Or Debate Clause Is A Judicial Determination

The Court should not defer to Congress's alleged conclusion that the Speech or Debate Clause does not bar CAA cases (see Hanson Br. at 21-31; Senate Amicus at 28-29) because (1) resolution of this issue requires constitutional interpretation, which is solely within the purview of the courts and (2) Congress never determined that CAA cases were not barred by the Speech or Debate Clause.

The scope of the Speech or Debate Clause is an issue of constitutional interpretation, which rests solely with the courts. See *Board of Trustees v. Garrett*, 531 U.S. 356, 365 (2001) ("it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees"); *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("'[i]t is emphatically the province and duty of the judicial department to say what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137,

177 (1803)) (alteration in original). "Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch,'" *Nixon*, 418 U.S. at 704 (quoting *Powell*, 395 U.S. at 549), so this Court has not deferred to the Senate's interpretation of the Speech or Debate Clause, see, *e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 113 (1979) (concluding that Speech or Debate Clause did not protect actions of the Senator even though the amicus brief filed by the Senate in that case argued otherwise).[13]

Further, Congress never concluded that the Speech or Debate Clause does not bar CAA actions.[14] Legislative history demonstrates Members' on-going separation of powers concerns with applying employment laws to Congress. Senators Ford, Heflin, Rudman and Stevens cosponsored an amendment to the proposed Government Employee Rights Act of 1991 ("GERA"), the predecessor to the CAA, providing that employment claims against the Senate would be addressed by an internal Senate office, not by the courts. S. Amend. 2112,

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[13] *McConnell v. FEC*, 540 U.S. 93 (2003), and *Rostker v. Goldberg*, 453 U.S. 57 (1981), state the general rule that Congress is given deference in areas where it has special expertise. *McConnell*, 540 U.S. at 137-38 (effect of contribution limits on the political process); *Rostker*, 453 U.S. at 64 (military). The case herein presents a much different issue. As noted, supra p. 13, Congress cannot decide when Speech or Debate Clause immunity applies; rather, the Member can assert his immunity "even against the declared will of the house . . . [and over] an act of the legislature." *Coffin*, 4 Mass. (1 Tyng) at 27. Congress and an individual Member can have conflicting interests with respect to asserting the privilege, as this case demonstrates.

[14] Senate Amicus's statement of the intent of CAA statutory language is not evidence of the entire Congress's intent at the time the CAA was passed. Moreover, fifty-five of the Senators who voted on the CAA in 1995 are no longer members of Congress.

101st Cong. (1990); see 136 Cong. Rec. S9342 (daily ed. July 10, 1990). Senator Ford explained: "[T]he Senate must be aware of creating potential conflicts with article I, section 6, clause 1 of the Constitution . . . ." *Id.* He noted that suits in federal court "could lead to the very 'questioning in another place' of Member actions that the Constitution attempted to guard against." *Id.* Likewise, Senator Stevens stated that a personnel decision regarding "personal assistants and policy advisors is integral to our functioning as legislators, and is therefore protected by the speech or debate clause." 137 Cong. Rec. S15385 (daily ed. Oct. 29, 1991). In the 102d Congress, with respect to a proposal for adjudicating claims challenging congressional personnel actions in court or before an executive branch administrative agency, then-Majority Leader Mitchell, a former federal judge, stated: "[T]his is the most blatantly, flagrantly, obviously unconstitutional proposal that I have seen since I have been in the Senate." *Id.* at S15359. The proposed amendment was defeated by a 61-38 vote. See *id.* at S15361. Regarding an amendment providing that cases would be adjudicated by an internal hearing board selected by a legislative office, Senator Mitchell explained, "Because of the 'speech and debate' clause prohibition which limits the reach of the Judiciary into the operations of a Senator's own office or committee, the independent hearing board is the trier of fact rather than [the Judiciary]." *Id.* at S15372-73. Similarly, in 1993, while commenting on her years of work on similar but unsuccessful proposed legislation, Congresswoman Schroeder stated, "[O]ne thing that we have learned since 1976 in working way back with Father Dryinan [sic], who is a great constitutional scholar, . . . if you are going to have a review and have it be constitutional, you probably can't go to the Federal courts, most constitutional scholars tell us." *Application of Laws & Administration of the Hill: Hearings Before the J. Comm. on the Org. of Cong.*, 103d Cong., S. Hrg. 103-115 (1993) at 4.

To address these concerns in the proposed CAA, Senator Mitchell asked Senator Glenn, as chair of the Governmental Affairs Committee, to "find a bipartisan solution" that would address Members' concerns. 141 Cong. Rec. S447 (daily ed. Jan. 5, 1995). On January 5, 1995, the House passed H.R. 1 and referred it to the Senate. This version of the bill was not acceptable to the Senate, which substituted its new draft of the bill, S. 2, for H.R. 1. See 141 Cong. Rec. S918 (daily ed. Jan. 12, 1995). While H.R. 1 did not contain § 413 or any similar language, S. 2 did contain § 413. S. 2, 104th Cong. (1995). In fact the only difference between H.R. 1 and S. 2 that addressed the Members' concerns about the principle of separation of powers is the addition of § 413. S. 2 passed and became law, the CAA, on January 23, 1995. 141 Cong. Rec. D72 (daily digest Jan. 23, 1995).

This legislative history confirms the clear statutory language -- Congress never determined that the Speech or Debate Clause did not bar court jurisdiction of any CAA case.[15] Rather, Congress passed the statute with the understanding that the Court would not allow a CAA case to proceed in violation of the Speech or Debate Clause.

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[15] The CRS memorandum Representative Goodling placed in the record, and which Hanson cites (Hanson Br. at 30), states:

> Staffs of Members are so essential to the functioning of the legislative process that under *Gravel* they are entitled to the same speech or debate immunity that the Members have. . . . [T]he [Speech or Debate] clause could very well protect the Members' discretion in choosing to hire or to keep or not keep any person they want on their staffs.

141 Cong. Rec. H265 (daily ed. Jan. 17, 1995).

D. Hanson's Suit Is Jurisdictionally Barred

Section 413 of the CAA preserves the "privileges" under the Speech or Debate Clause -- both the immunity from suit and testimonial privilege. 2 U.S.C. § 1413. Accordingly, the Speech or Debate Clause bars court jurisdiction of CAA cases that are predicated on a legislative act, or would require questioning of a legislative act or the motivation for the act, or would require a Member to answer -- in terms of defending himself -- for a legislative act and/or his motive for the act. See Appellant Br. at 25-27.

Application of this principle to Hanson's Fair Labor Standards Act claim bars court jurisdiction of that claim because adjudication of that claim would require questioning in detail Hanson's day-to-day duties and his performance of those duties, including whether his work was of substantial importance to the management or operations of the Dayton Office and the extent to which he exercised discretion and independent judgment in the performance of his job duties. See Appellant Br. at 40-41. Because Hanson's job duties were part of the legislative process, see below and Appellant Br. at 5, 38-40, such questioning would constitute questioning legislative acts.

Further, application of this principle to CAA discrimination claims would bar court jurisdiction of a case brought by an employee whose duties are part of the due functioning of the legislative process, unless the challenged action is beyond the apparent needs of the due functioning of the legislative process. That is so because managing an employee whose duties are part of the due functioning of the legislative process is itself part of the due functioning of the legislative process. See Appellant Br. at 28-32. Application of this rule bars court jurisdiction of Hanson's termination claims.

First, Hanson's job duties were part of the due functioning of the legislative process. See Appellant Br. at 38-40. He worked on "issues that were at the heart of Senator Dayton's constitutional obligation to represent his constituents . . . ." Hanson Br. App. 1a-2a ¶ 1. Hanson acted as Senator Dayton's representative to learn, among other things, "their (i) opinions about whether Senator Dayton should support or oppose certain legislation and (ii) suggestions regarding legislation Senator Dayton should introduce." J.S. App. 68a ¶ 6. "The information Mr. Hanson gathered from constituents, which was passed on to Senator Dayton, helped shape the Senator's legislative agenda and assisted him in representing Minnesotans." J.S. App. 68a ¶ 6. "Based on concerns constituents voiced to Mr. Hanson, he presented ideas to Senator Dayton that directly caused Senator Dayton (i) to initiate and to sponsor legislation . . . and (ii) to initiate a [Senate] hearing . . . ." J.S. App. 68a ¶ 6. Hanson was one of a few staff members who planned the committee hearing, "decided on its issues, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing." J.S. App. 73a ¶ 14. Throughout his employment by the Dayton Office, Hanson's job included identifying opportunities for legislative initiatives. See J.S. App. 76a, 80a. Thus, Hanson was Senator Dayton's second self -- assisting the Senator to perform his constitutional duties. Second, Hanson's termination was not beyond the apparent needs of the due functioning of the legislative process. It was part of the due functioning of Senator Dayton's legislative process because the process functioned only if Senator Dayton selected alter egos. As such, the termination was a legislative act protected by the Speech or Debate Clause. Because Hanson's challenge to his termination is predicated on his termination and would necessarily require questioning his termination and/or the motivation for his termination, the Speech or Debate Clause bars court jurisdiction of his discrimination claims.

Moreover, the Speech or Debate Clause would bar court jurisdiction of Hanson's discrimination claims if the Court holds that the Clause bars jurisdiction of discrimination claims only where the challenged personnel action relates to the employee's performance of legislative duties. See Appellant Br. at 32-33. Hanson was terminated for his poor performance as head of the Health Care Help Line. For example, Hanson had ignored 150 constituent matters that provided information to Senator Dayton of constituents' concerns and "guide[d] [him] in determining what legislation he should sponsor, support or oppose." Hanson Br. App. 2a. Senator Dayton's performance of his constitutional duties was impeded by Hanson's failure to perform his job. See Hanson Br. App. 2a. Hanson's challenge to his termination could not be adjudicated without questioning his performance of his job duties within the legislative sphere and/or without requiring Senator Dayton to answer -- in terms of defending himself -- for a legislative act, i.e., Hanson's performance of his duties within the legislative sphere. Accordingly, the Speech or Debate Clause bars court jurisdiction of Hanson's discrimination claims.

* * * * *

For the foregoing reasons and those stated in the Dayton Office's opening brief, the Court should accept jurisdiction of this appeal pursuant to CAA § 412, dismiss the case as moot, or, alternatively, reverse the judgment of the court of appeals and remand with instructions to dismiss as jurisdictionally barred.

Respectfully submitted,

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